ORIGINAL

SUMMARY OF COMMENTS

IN GN DOCKET NO. 93-252

PART 22/PART 90 TECHNICAL RULES REWRITE

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FORWARD

On May 20, 1994, the FCC released a Further Notice of Proposed Rulemaking in its proceeding to implement Sections 3(n) and 332 of the Communications Act, as amended.[1] The initial round of comments on the Further Notice were filed on June 20, 1994, and are briefly summarized herein.

We have done our best to represent each commenter's positions accurately on a range of issues within two pages and in a consistent format. Due to space and time constraints, however, many supporting arguments have been truncated and rephrased to conserve space. Accordingly, in all cases, it is highly advisable to review the actual commenter's text. All summaries have page references to the actual commenter's text.

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[1] In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, FCC 94-100 (rel. May 20, 1994).

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AIR SPECTRUM III, INC.

Interest: 900 MHz SMR system licensee.

Technical rule change proposals:

- **Service area definitions/transition provisions:**

  -- Supports the Commission's 900 MHz Phase II proposal to introduce wide-area licensing in the 900 MHz SMR band. (2)

  -- Stresses that the Commission should protect the interests of existing 900 MHz SMR operations outside of designated filing areas when adopting rules for the expansion of 900 MHz licensing. (2)

AIRTOUCH COMMUNICATIONS

Interest: Provider of paging, cellular, and other wireless services (formerly PacTel Corporation).

Spectrum Aggregation Caps:

- Extension of the spectrum caps previously imposed on cellular and PCS services to all CMRS services would be arbitrary, capricious and would lack any basis in economic theory, antitrust law or fact. (6)

- Believes that competition among CMRS offerings would best flourish if providers were free of such artificial and arbitrary strictures as spectrum ownership or firm size limits. However, any such limits must be applied fairly and equally to all providers of competing services, including ESMR providers. (7)

- Caps should not be extended beyond the providers of PCS, cellular and EMRS services as CMRS services are diverse and do not constitute a single economic market. (9)

- The dynamic growth and technological change taking place in CMRS services renders the overlay of a unified, rigid structure on all CMRS providers irrational and unsupportable. (8-9, Hausman Affidavit, McAfee and Williams Report)

- For many of the same reasons, the unilateral acquisition and exercise of power over prices or output by any given provider is implausible. (12-16)

- Collusion is not likely to occur in CMRS because: (1) the actual and potential providers of CMRS services are too numerous and too diverse to have common interests that would bind them to any collusive course; (2) the rapid rate of technological change makes any collusive agreement difficult to achieve; (3) all CMRS providers do not compete with one another; and (4) any licensee that engages in collusive conduct risks the loss of its license. (10-12)

- No spectrum cap should be imposed on satellite services, as such services are not economic substitutes for broadband CMRS. (16-17)

- The five percent attribution rule for CMRS is too restrictive and is likely to defeat the FCC's goal of fostering a diverse and competitive array of services by

constraining investment in CMRS by firms with the greatest accumulated experience in various existing CMRS services. (18-20)

- Whatever the FCC decides with respect to its proposed five percent attribution rule, the FCC should not limit further the coexisting attribution rule adopted in the broadband PCS proceeding so that an entity does not trigger the 35 MHz restriction on spectrum ownership until it reaches a 20 percent ownership interest in a cellular licensee. (17-18)

AIRTOUCH PAGING AND ARCH COMMUNICATIONS GROUP, INC.

Interest: AirTouch and Arch are both Part 90 and Part 22 paging providers. Arch also provides common carrier mobile and specialized mobile radio services.

Substantial similarity between services:

- Agree with the FCC's tentative conclusion that private and common carrier paging should be deemed substantially similar for statutory purposes. (3)

Creating comparable regulatory requirements:

- Agree with the FCC's tentative conclusion that it should focus on identifying and conforming differences in the technical and operational rules in Parts 22 and 90 that would otherwise lead to arbitrary or inconsistent treatment of substantially similar CMRS licenses, thereby thwarting the development of a level and competitive regulatory playing field. (3-4)

- Encourage the Commission to establish a single bureau with a narrowband division and a broadband division, to handle all CMRS services. (3)

Technical rule change proposals:

- **Channel assignment rules:**

  -- If the Commission moves towards wider-area, multi-channel licensing for 800 MHz and 900 MHz SMRs, these carriers should be governed by the same general channel assignment rules that apply to interconnected cellular carriers. (7)

  -- Suggest that rule revisions be structured to encourage new market entrants and not unreasonably favor incumbent licensees. (8)

- Support wide-area market licensing for 900 MHz paging operations. (9)

- Suggest that the Commission keep open the possibility of taking additional steps to conform 900 MHz common carrier and private carrier paging ("PCP") assignment rules, but that no changes in the rules governing 900 MHz PCP systems should be adopted in this docket. Changes at this time would disrupt the development of 900 MHz PCP systems. (7-8)

- **Co-channel interference criteria:** Support comparable technical regulation for all CMRS services when possible. In the 900 MHz paging context, the FCC should conform the power levels to the maximum extent possible, and then conform co-channel protection criteria accordingly. (9)

- **Antenna height and power limits:**

  -- Both commenters urge the Commission to adopt the same power levels for 900 MHz PCP operators as for 900 MHz common carrier paging, and to adopt the increased power limits suggested in CC Docket No. 93-116 for 900 MHz common carrier paging as well as PCP operations. (10)

  -- Urge the FCC to allow non-nationwide licensees at 929-930 MHz to operate at up to 3500 watts ERP in their existing service areas, as Part 22 non-nationwide paging systems may do. (10)

Operational rule change proposals:

- **Construction periods and coverage requirements:**

  -- Support the FCC's proposal to adopt a uniform 12-month construction period for CMRS licensees under both Parts 22 and 90 except in services where a longer time period is authorized. (5)

  -- Support the inclusion of an extended implementation schedule for common carrier paging identical to that accorded 900 MHz licensees. (5)

  -- Support the FCC's proposal to require the commencement of service by the end of the construction period <u>only</u> if the rules allow wide-area paging systems an extended implementation period. (10-11)

  -- Wide-area paging systems involving 73 or more transmitters should automatically qualify for extended implementation. (11)

- **Loading requirements:** Support the elimination of loading requirements. (11)

- **General licensee obligations:** Strongly endorse the FCC's proposal to adopt general rule allowing CMRS licensees operating multiple station systems to use a single call sign on a system-wide basis. (11-12)

Licensing rules and procedures:

- **Comments on new application form:** Support the use of a single application form for all CMRS providers. (5)

- **Application form transition provisions:** Recommend that adoption of a new uniform licensing form be deferred until the transitional rules are adopted so as to allow the transitional rules to be put in place before a new form is adopted. (5-6)

- **Application fees:** Regulatory parity mandates that equivalent filing fees apply to substantially similar services. To streamline licensing, however, the lower private radio fee schedule should be utilized. (6)

- **Public notice and petition to deny procedures:** Both commenters agree that the Part 22 public notice and petition to deny procedures should apply to all CMRS operators. To prevent delays, the commenters urge that litigants be required to supply draft orders with their pleadings, which would enable Commission to issues decisions more quickly. (6)

- **Mutually exclusive applications:** Support the use of competitive bidding procedures to resolve competing CMRS applications. (14)

- **Amendment of applications and license modifications:** Proposed definitions of "major" and "minor" amendment represent prudent approach that has worked well over time. (15)

- **Conditional and special temporary authority:**

  -- Urge the FCC to add a rule giving applicants who have coordinated facilities that are on public notice without protest temporary authority to operate with the condition that the licensee will immediately turn off the facility at the Commission's request. (13)

  -- If temporary authority is unavailable, the Commission should seek statutory authority to permit pre-grant operation in those circumstances where no engineering, technical or interference challenge has been lodged. (13)

- **Pre-authorization construction:** Applicants should be permitted to commence construction at any time, provided that know they are proceeding at their own risk and comply with environmental and aviation hazard rules. (12)

- **License term and renewal expectancies:** Strongly endorse uniform 10-year license term for all CMRS licensees and extension of existing rules and case law concerning renewal expectancy to all CMRS licensees. (7)

- **Transfers of control and assignments:** Favor free alienation of licenses. (13)

AMERICAN MOBILE SATELLITE CORPORATION

Interest: Parent corporation to AMSC Subsidiary Corporation, which has been licensed by the FCC to construct, launch, and operate the U.S. MSS-AMS(R)S satellite system.

Spectrum aggregation caps:

- A spectrum cap should not be applied to satellite spectrum because it is not comparable to other CMRS spectrum. (8-10)
- A spectrum cap should not be applied to satellite spectrum because international frequency coordination forces satellite systems to access less spectrum than is assigned to them by the Commission. (8-9)
- Contrary to the Commission's suggestion, the problems international coordination pose for a spectrum cap will never go away because the coordination process is perpetual. (9)
- Satellite spectrum has less capacity than terrestrial spectrum, lessening the impact access to satellite spectrum has on mobile service competition and the need for a spectrum cap. (9)
- An uncertain amount of satellite spectrum is subject to preemptive access for aviation safety communications. A cap would hinder a satellite system's ability to provide non-preemptible service to its customers. (10)
- Satellite systems require large amounts of spectrum for feeder links. Inclusion of feeder link frequencies in a spectrum cap would be ruinous for satellite systems. (i, 10)
- There are no satellite CMRS providers that have market power or a reasonable prospect of attaining market power, obviating the need for a spectrum cap on satellite spectrum. (10-12)
- Satellite systems will face substantial competition from well-established terrestrial services, new satellite services, and resellers of space segment. (11-12)
- Attribution rules for a cap on satellite spectrum are unnecessary and would harm development of satellite services, which gain strength from diverse ownership. (12)

- Pioneer companies that invest in satellite systems should not be penalized by the inclusion of satellite spectrum in a spectrum cap. (12)

- Satellite services have an obligation to provide service on a nondiscriminatory basis, which prevents the attainment of anti-competitive advantage through investment in satellite systems. (12)

- The FCC should continue to judge satellite spectrum applications on an individual basis, rather than imposing rigid rules prescribing the amount of spectrum available to any one entity. (13-14)

- The absence of a cap on satellite spectrum has provided satellite systems with an incentive to be active in efforts to secure additional spectrum for the MSS industry generally, which can improve competition. (14)

AMERICAN MOBILE TELECOMMUNICATIONS ASSOCIATION, INC.

Interest: Nationwide non-profit private land mobile trade association.

Substantial similarity between services:

- Agrees that the FCC should consider perceived substitutability in determining whether services are substantially similar, but also urges the agency to take into account objective factors such as allocation and frequency assignment plan. (6)

- Supports regulatory symmetry for substantially similar services. (2)

- Agrees that wide-area SMRs will be substantially similar to cellular service, but that conventional or trunked SMRs offering only limited interconnected service on an ancillary basis to dispatch may not be comparable to more geographically expansive services. (8)

- Argues, however, that wide-area SMR spectrum cannot be considered functionally equivalent to cellular as long as SMR frequencies are not "clear" i.e., as long as wide-area SMR operators must co-exist with a multitude of co-equal, co-channel traditional SMR facilities scattered throughout their service area. (15)

Creating comparable regulatory requirements:

- Urges the FCC to consider traditional SMR operations as a discrete service with no common carrier counterpart, and to devise rules tailored to the specific role traditional SMRs serve in the wireless marketplace, without reference to common carrier standards other than as required under Title II. (10)

- Even if traditional SMRs are not substantially similar to cellular, broadband PCS, or wide-area SMRs, they must be given the regulatory tools to maintain a competitive position in the wireless marketplace. (11)

- Regulatory parity requires that all 220-222 MHz licensees be allowed to enjoy the 3-year transition period to CMRS regulation. (22-23)

Spectrum aggregation caps:

- AMTA opposes adoption of a CMRS spectrum cap, and argues that the Commission's current approach of addressing ownership limitations on a service-by-service basis is preferable because it allows the agency to "fine tune" its efforts to promote competitive opportunities. (28)

- Although the record in the PCS proceeding supported the adoption of a spectrum cap in that service-specific context, there has not been any similar showing in the overall CMRS arena. (29)

- Existing regulations already limit the aggregation of spectrum by PCS, cellular, and SMR licensees. (30-32)

- In view of the regulatory environment in which SMRs must implement their systems, the spectrum cap will only serve to inhibit the ability of SMR operators to establish systems capable of competing with broadband CMRS operations by prohibiting necessary capital investments. (31-32)

- If the Commission proceeds with the spectrum cap proposal, AMTA recommends that the cap be more expansive than 40 MHz, so that inherent differences in spectrum quality can be taken into account. (32)

- If SMR spectrum is included in the cap, a formula must be devised so that the Commission can compare SMR channels to those used in cellular and PCS, which will require some method of prorating based on the narrower bandwidth, lack of geographic exclusivity, and site-by-site licensing in the SMR context. (32-33)

- To reduce the administrative burden posed by having to calculate non-controlling, minority ownership interests, AMTA recommends the use of an attribution standard of at least 40 percent, unless a party is determined to have actual control at some lower level. (34)

Technical rule change proposals:

- **Service area definitions/transition provisions:**

  -- Supports adoption of a geographic licensing scheme for wide-area SMRs, and anticipates preferring boundaries based on MTAs rather than self-defined service areas. (15)

  -- AMTA believes its wide-area 800 MHz "EMSP" proposal is still a useful guide for geographic licensing,

and is willing to re-evaluate the proposal as necessitated by recent changes in the regulatory environment. (16)

-- Urges the FCC to complete the 900 MHz SMR licensing process by establishing an MTA-based, wide-area framework to allow existing licensees to expand their systems before competitive bidding by new entrants commences on this spectrum. (17-18)

- **Co-channel interference criteria, antenna height and power limits, modulation and emission requirements, interoperability:** AMTA has not identified a need to modify the existing Part 90 requirements as these rules do not appear to inhibit the ability of reclassified Part 90 CMRS operators to compete in the general CMRS marketplace. (7)

Operational rule changes:

- **Construction periods and coverage requirements:** Supports the proposal to extend to 12 months the construction period for all CMRS operators, except those qualifying for extended implementation, and the proposed re-definition of "constructed" to include commencement of service. (7)

- **Loading requirements:** Supports elimination of the 40-mile rule and system loading requirements for traditional trunked SMR systems. (11-13)

- **End user eligibility, permissible uses, station identification, general licensee obligations:** Recommends no changes in the Part 90 rules. (8)

- **Equal employment opportunities:** Supports application of exemption from filing requirements for licensees with fewer than 16 employees. (8)

Licensing rules and procedures:

- **Application fees and regulatory fees:** Favors the adoption of equivalent fee requirements for substantially similar services, but believes that the Part 90 fee structure should remain in place until the Commission reconciles licensing disparities, particularly the way individual transmitter sites are authorized. (36-37)

- **Public notice and petition to deny procedures:** Urges the Commission to: (1) limit to the greatest extend possible those applications that are defined to require

public notice; and (2) take the strongest possible action against those who abuse the agency's process in their use of these procedures. (37)

- **Mutually exclusive applications:**

  -- AMTA urges the Commission to analyze separately the appropriate licensing procedures for 800 and 900 MHz SMRs. (39-40)

  -- The procedures used at 800 MHz have worked effectively and should not be abandoned hastily. (39)

  -- AMTA argues that the 800 MHz SMR structure, in which spectrum is only available in underpopulated regions of the country, systems are being implemented in most areas, and the majority of wide-area systems consist of the consolidation of existing systems, is unsuitable for competitive bidding, and urges the FCC to defer any decision on this point until it has determined what licensing approach to adopt for wide-area 800 MHz SMRs. (40)

- **Amendment of applications and license modifications:**

  -- AMTA "accepts as reasonable" the Commission's proposal to use the Part 22 criteria for defining "major" and "minor" amendments for all CMRS applicants. (40-41)

  -- AMTA also agrees with the Commission that applications should not necessarily be subject to competitive bidding simply because the amendment would be classified as "major" under Section 309 of the Communications Act, and urges that such a result would be contrary to the legislative history of the Budget Act. (41-42)

- **Conditional and special temporary authority:** Although AMTA would prefer the use of the flexible Part 90 procedures for all CMRS requests for special temporary authority, it is unable to see how that approach can be conformed to the statutory requirements. (42)

- **Pre-authorization construction:** Agrees with the Commission's proposal to reconcile the Part 90 and Part 22 pre-grant construction requirements by applying the more liberal Part 90 rules to all CMRS services. (42)

- **License term and renewal expectancies:** Supports Commission's proposal to establish a uniform 10-year

license term for all CMRS licensees, and urges the FCC to apply its current policies toward renewal expectancy. (42)

- **Transfers of control and assignments:**

  -- Supports the adoption of rules permitting assignments of unconstructed facilities when the ownership change is pro forma, and recommends a flexible approach when parties seek to acquire an ongoing communications business where some facilities are not yet in operation. (43)

  -- Disagrees with the Commission's suggestion concerning the imposition of a holding period before transfer of a wide-area SMR may be permitted, because trafficking generally is not an issue in the context of wide-area SMRs. (43-44)

  -- Urges the Commission to modify its Part 90 assignment and transfer licensing procedures to parallel the two-step process used in the common carrier and mass media services. (44)

- **Conversion to CMRS status:** Agrees with the FCC that Part 90 licensees must be given some period of time to correct their authorizations to reflect actual operating parameters, and suggests that 90 days is an appropriate period of time to request such changes. (44)

Other:

- AMTA does not oppose regional 220 MHz licensing, but believes that any regional licensing scheme must encourage the prompt delivery of services to the public and must ensure that enough spectrum remains available for other competitors. (24)

- AMTA proposes that regional operators at 220-222 MHz should be limited to holding an ownership interest in eight 5-channel trunked systems, or a maximum of 40 individual channels, in each geographic area, and submits that this limited aggregation is consistent with the applicable rules. (24-25)

- Although AMTA supports extended implementation for regional 220 MHz operations, it argues that the 8-year extended implementation period requested by SunCom is excessive, and proposes instead a maximum 3-year period with specific interim construction benchmarks. (26)

- AMTA suggests that regional 220 MHz operators such as SunCom should be subject to financial showing requirements similar to those applied to nationwide 220 MHz applicants. (27)

AMERICAN PERSONAL COMMUNICATIONS

Interest: New PCS entrant.

Spectrum aggregation caps:

- Supports a spectrum cap but believes that general spectrum aggregation caps should be applied after service-specific limits are adopted, such as the PCS cap. (1-2)

- Notes that this proceeding recognizes that ESMR, cellular and PCS are competitive and that any 40 MHz cap should apply to all such services. (2)

- Believes the FCC should treat narrowband and broadband services separately for purposes of a spectrum cap, since the offerings differ to a substantial degree. (2-3)

- Argues that the 5 percent attribution and 10 percent overlap standards should apply to all CMRS services, and disfavors across the board exemptions to such limits for designated entities. (3)

- Disfavors an across the board divestiture rule allowing companies to bid for spectrum in excess of a cap, since such action would skew auction results, drive away independent bidders, and result in less competition. (3-4)

Technical rule change proposals:

- **Antenna height and power limits:** Should be addressed in service specific rulemakings to account for technical differences, with the recognition that competition can be addressed in such rulemakings. (4)

- **Interoperability:** Opposes interoperability standards, since such requirements would slow new service entry, add to consumer costs, and obstruct marketplace forces. (4-5)

AMERICAN PETROLEUM INSTITUTE ("API")

Interest: Trade association representing companies involved in all phases of the petroleum and natural gas industries.

Creating comparable regulatory requirements:

- API is concerned that the swiftness of this proceeding could result in the implementation of poorly drafted rules and unintended consequences, particularly for Part 90 operators. Thus, API cautions the Commission to keep other outstanding proceedings, particularly the refarming proceeding, separate. (3,5)

- Similarly, the Commission should forego general amendments to Part 90 that may inadvertently affect the regulation of PMRS operators. (5)

Operational rule change proposals:

- **Permissible Uses**

  -- API strongly believes that the permissible communications rules pertaining to PMRS systems remain relevant and should not be revised. (7)

  -- Because PMRS spectrum is shared on a co-channel basis, these restrictions are necessary to limit communications to those related to safety of life and property or other activities that form the basis of the licensee's eligibility. (6-7)

  -- Because problems concerning spectrum congestion have been exacerbated by the removal of restrictions on permissible restrictions in the private radio services, the existing rules should not be further revised as they pertain to PMRS systems. (8)

Licensing rules and procedures: API is concerned that the proposed application may be unnecessarily complex for PMRS licensing requirements, and urges the FCC to clearly label those sections that do not apply to PMRS "For CMRS Applicants Only." (4)

BELL ATLANTIC COMPANIES

Interest: Regional Bell Operating Company

Substantial similarity between services:

- Notes the NPRM properly pursues regulatory parity between reclassified Part 90 services and Part 22, but ignores the obligations to conform CMRS and PCS rules. Examples of disparities include service definitions; dispatch restrictions; and detailed regulations on construction, maintenance, and operation of transmitters. (2-6)

- Other rule disparities the Commission should consider include the wireline SMR ban and the RBOC structural separation rules applicable to cellular. (7-8)

Spectrum aggregation caps:

- The spectrum cap proposal should be limited to imposing ownership limits on wide-area SMRs that parallel other ownership limits for CMRS; attempting a broader inquiry diverts attention from the parity tasks at hand and introduces severe complications. (8-10)

- For SMRs, proposes prohibiting wide-area SMRs from having more than a 5-20 percent interest in cellular or broadband PCS systems in overlapping areas; barring wide-area SMRs from acquiring more than one 30 MHz license in areas where it has SMR authorizations; or imposing a 40 MHz cap for SMRs that includes all SMR, cellular, and PCS spectrum. (11-12)

Operational rule change proposals:

- **Equal employment opportunities:** Endorses extending Part 22 requirements to all CMRS providers. (13)

Licensing rules and procedures:

- **Comments on new application form:** Endorses form to ease administrative burdens; notes that the NPRM limits disclosures relating to revoked licenses to controlling parties but Form 600 does not; and that the FCC has not addressed conforming burdens requiring Part 22 applicants to disclosure huge numbers of insignificant ownership interests under the real party in interest rules. (13-15)

- **Application fees/regulatory fees:** Regulatory parity compels adopting similar application and regulatory fees. (15)

- **Public notice and petition to deny procedures:** Regulatory parity requires adopting Section 309 procedures for all CMRS applicants. (15-16)

BELLSOUTH CORPORATION & AFFILIATES

Interest: Regional Bell Operating Company.

Creating comparable regulatory requirements:

- Consistent with the terms of the *Budget Act*, the paramount goal of this proceeding should be to create regulatory parity by elminating regulations or applying the least restrictive of the relevant service-specific rules. (3-5)

Spectrum aggregation caps:

- There is no need or basis for the FCC to adopt a CMRS spectrum cap, since the CMRS market is competitive, competitive bidding rules impede the artificial aggregation of licenses, the narrowband PCS marketplace has been characterized as "highly competitive," the FCC can address concerns related to excess market power by other means, and the question of a cap raises many practical problems. (6-12)

Technical rule change proposals:

- **Interoperability:** The FCC should remove interoperability restrictions from all CMRS providers. (15-16)

Operational rule change proposals:

- **Permissible uses:** All CMRS providers should be eligible to provide dispatch services. (14-15)

- **Equal employment opportunities:** EEO obligations should be applied uniformly to all CMRS providers. (20)

Licensing rules and procedures:

- **Mutually exclusive applications:** Agrees with tentative conclusion that all CMRS applications should be subject to 30 day period for the filing of mutually exclusive applications, and would correct deficiencies in the cellular Phase II procedures. (16-17)

- **Pre-authorization construction:** CMRS licensees should be permitted to construct at any time, subject to compliance with FAA and environmental regulations, as in done in Part 90. (19-20)